JOHN

No. 10266

In the United States Circuit Court of Appeals for the Ninth Circuit

La Verne Cooperative Citrus Association et al.,
appellants

v.

United States of America, Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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INTRODUCTION

The appellee submits this supplemental brief in compliance with the direction of the Court at the oral argument in this case, which took place on October 15, 1943. The brief will discuss the questions treated in the appellants' supplemental brief.

I. The separate defense in the answer in each of the cases on appeal does not state a valid defense

A. Generally

Each of the appellants interposes in its answer substantially the same defense to the complaints. For the purpose of this supplemental brief, the defense stated in the La Verne answer will be taken as typical

of all, except for the additional defense (R. 84) set forth in a certain portion of paragraph one of the answers of the appellants other than La Verne and Glendora. This method of treatment is adopted also by the appellants in their supplemental brief. In the appendix thereto are set forth the portions of the answers which appellants say contain the gist of their separate defenses (Appellants' Supplemental Brief, p. 3). Consideration of whether the separate defenses are good in law may, therefore, be confined to these averments.

B. Paragraphs one, three, and four of the separate defense

Paragraphs one, three, and four of the separate defense allege general matters concerning the lemon industry as a whole. Differences in the storage capacity of dark green, light green, silver and tree-ripe lemons are pointed out, and it is alleged that these differences may require different methods of handling, shipping, and marketing each type of lemon. It is stated that the coastal areas of California produce higher proportions of green lemons than do the interior areas where peak picks are earlier, and that there are marked differences in the proportions of green to tree-ripe lemons in different groves in the same district, the age and physical condition of the trees and soil conditions being controlling factors. Likewise, the proportion may vary in the same grove from year to year with variations in climatic conditions. The method of handling lemons commercially is explained, and it is alleged that a handler must pack at least two and usually

three carloads at a time in order to operate economically and compete successfully.

These allegations taken by themselves, and accepted as true, certainly do not constitute a valid defense. They do not relate the position of the individual appellants to the general conditions pictured, nor do they show that appellants are affected by the lemon order differently from any other handler coming within its scope.

C. Paragraph ten of the separate defense

Paragraph ten of the separate defense complains that the lemon order prevents the appellants from filling the orders of their regular customers and from selling large quantities of lemons at profitable prices. It is also stated that the orders which the appellants were unable to fill were filled by the California Fruit Growers Exchange. This is not a valid objection to the lemon order. The appellants concede that the frustration of their contracts does not in itself make the order invalid (Appellants' Supplemental Brief, p. 3). The restriction of shipments under prescribed conditions is the primary purpose of the act and the lemon order, and the constitutional power of Congress to impose such restrictions is not challenged by the appellants. There is no allegation in this paragraph of the separate defense that the restriction on shipments has been applied discriminatorily against the appellants.

D. Paragraph eleven of the separate defense

Paragraph eleven states that in order to operate competitively under the lemon order appellants are re-

quired to expend large sums of money to expand their storage facilities. It is also averred that the order puts appellants to great expense in the rehandling of lemons. However, appellants concede that neither of these matters constitutes a valid defense (Appellants' Supplemental Brief, p. 3).

E. Paragraph Twelve of the Separate Defense

Paragraph twelve is characterized by the appellants as the heart of the separate defense (Appellants' Supplemental Brief, p. 3). It first avers that the administration of the lemon order has been unreasonable, arbitrary, unjust and discriminatory as against appellants in that *total* weekly shipments have been fixed in unreasonably low amounts and in amounts much less than the market would absorb at profitable prices. This, if true, could hardly be a discrimination against appellants for it would be equally restrictive as to all handlers. The determination by the Secretary of Agriculture of the amount of the total advisable weekly shipments of lemons is based upon an appraisal of various economic factors. It is not contended by the appellants that such determinations are subject to judicial review. No effort was made by them to proffer evidence in support of the allegation, nor are any facts alleged which might form a foundation for it. Since this allegation is not discussed in appellants' supplemental brief, it may be regarded as out of the case.

It is further alleged in said paragraph twelve that, because of the unreasonably low and discriminatory allotments allowed appellants, they have been com-

pelled to dispose of a large quantity of lemons to by-products and other nonfresh fruit channels, and they will be unable to market quantities of tree-ripe lemons in fresh fruit form, with loss of the benefit of such lemons in the computation of allotments except during their brief storage life, in consequence of which they are suffering great loss. This is the first reference in the separate defense to discrimination *against appellants* in the making of *individual* allotments. The effects described as resulting therefrom are the same which would result from the making of any allotments, and no support for appellants' defense can be gained from their mere recital. There is simply the bare statement of discrimination. No facts are alleged to show that appellants are treated or affected differently from other handlers. It appeared later from the proffered evidence that appellants intended to establish that they are so differently situated from other handlers that *similar* treatment amounted to discrimination against them. As shown hereinafter, they were unsuccessful in this effort. In the separate defenses, however, no facts are alleged which would serve as a foundation for that or any other claim of discrimination.

F. Paragraph thirteen of the separate defense

Paragraph thirteen suffers from the same infirmity as paragraph twelve. The claim of discrimination is reiterated, but not a single allegation of fact is made.

G. The separate defense does not allege an unlawful discrimination

Assuming that the fact of discrimination has been adequately pleaded by the appellants, it does not fol-

low that it is such a discrimination as would invalidate the lemon order. The discrimination is said to consist in placing green and tree-ripe lemons in one classification for the purpose of proration. In the original brief of the appellee, it was pointed out that this is a matter peculiarly for legislative or administrative determination, and, further, that the Constitution of the United States provides no guarantee against discriminatory federal regulation (Appellee's Brief, pp. 26–27). Conceding that discriminatory federal regulation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, it can hardly be said that the separate defenses make out such a case. The presumption of the existence of a state of facts justifying the lemon order is far too strong to be overturned by such suggestions as are made here. See *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 567–568 (1939). Finally, with respect to the contention, first made in the appellants' supplemental brief, that the lemon order fails to conform to the requirements of Sections 8c (6) (A), (B), and (C) of the Act, no hint of this appears in any of the separate defenses.

II. The excluded evidence does not support appellants' claim of discrimination

A. Only the appellant, Chula Vista, has attempted to show discrimination

The appellants have selected the evidence proffered with respect to the appellant, Chula Vista Mutual Lemon Association, as an example for the purpose of discussing this aspect of the appeal. It should be made clear, however, that the situation of Chula Vista is not common to that of the other appellants. It appears

that a large percentage of the lemons handled by Chula Vista are small size tree-ripe fruit (R. 183). In this respect, Chula Vista may be distinguished from the other appellants as to whom there is no evidence that they handle lemons in a different manner from other handlers subject to the lemon order (R. 194–214, 214–226, 226–239, 239–240, 240–241). On this ground alone, the separate defense as to all the appellants but Chula Vista must fail.

B. The place of the appellants in the marketing of lemons prior to compulsory proration

Considerable evidence was proffered showing that since the beginning of proration under the lemon order the appellants have been unable to dispose of as large a proportion of their fruit in fresh fruit channels as they did in the years prior to the order, when they were able to sell substantially all of their marketable fruit (R. 163). This is a natural effect of proration, which implies a sharing of the available market when the supply so far exceeds demand as to threaten cut-throat competition and severely depressed prices. However, there is an explanation of the appellants' previously favorable marketing position which has a direct bearing on the issues involved here. It is common knowledge that since 1924 the California Fruit Growers Exchange, which handles approximately ninety percent of the total lemons produced in this country, has voluntarily adopted a plan of proration.[1] The purpose of that plan was to keep

[1] *The Citrus Industry and the California Fruit Growers Exchange System*, Circular C–121 (June 1940), Farm Credit Admin-

from the fresh fruit market in seasons of surplus production a proportion of the lemons handled by each of its member associations in order to maintain prices and assure a better return to growers. By virtue of this voluntary proration, outside organizations, such as the Mutual Orange Distributors, of which the appellants are members, were able to dispose of substantially all their marketable fruit in fresh fruit channels at comparatively favorable prices. For instance, the proffered testimony shows that while Mutual Orange Distributors made about 95 percent of its interstate sales on private orders rather than through the auction markets, the prices obtained for its fruit were determined by the auction market prices (R. 157–8), which were considerably influenced by the voluntary proration of the California Fruit Growers Exchange. In this manner, Mutual Orange Distributors and its member associations reaped the benefits of proration without bearing any of its burdens. It may be inferred that the steady annual increase in the Mutual Orange Distributors' percentage of total lemon shipments (R. 159–160, 288) was in large part due to the artificial advantage thus accruing to its members. Insofar as the lemon order deprives them of that advantage and distributes the burden of proration among all lemon handlers, appellants are not in a position to complain.

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istration, United States Department of Agriculture, 72; *Economic and Legal Aspects of Compulsory Proration in Agricultural Marketing*, Bulletin 565, December 1933, University of California, 19.

C. Storage of lemons under the lemon order

The evidence proffered to show that compulsory proration has required appellants to keep many lemons in storage beyond the point where they were in good condition for shipment as fresh fruit (R. 166–7) does not establish any discrimination. The lemon order does not guarantee that all lemons will be shipped in fresh fruit channels. It simply sets up machinery for adjusting market supply to anticipated demand. The 1940–41 crop year [2] witnessed the greatest lemon crop in history.[3] Large quantities of lemons were permanently withheld from the fresh fruit market because of the inordinately large supply, although carlot shipments were the greatest in history.[4] What the appellants complain of in this respect was also true of all other handlers affected. That can hardly be discrimination.

Nothing in the lemon order requires appellants to ship as fresh fruit, lemons which are not in good condition for marketing. The implication to that effect appearing on page sixteen of the appellants' supplemental brief is misleading. Appellants' did not offer to show that they were unable to fill all their

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[2] The 1940–41 crop year began November 1, 1940, and ended October 31, 1941. This is the year in which the lemon order went into effect and to which the proffers of proof relate.

[3] 17,000,000 boxes as against 11,983,000 boxes for the previous year which had been the highest record crop (R. 259, 288; Agricultural Statistics, 1942, United States Department of Agriculture, 236).

[4] More than 24,000 cars as opposed to less than 20,000 for the previous year (R. 288; Agricultural Statistics, 1942, United States Department of Agriculture, 237).

allotments with fruit in good marketable condition; in fact they sought to prove that they shipped only the best grades of lemons (R. 163, 186).[5]

D. Appellants' claim of monetary loss in inability to fill orders for lemons

It is claimed that appellants could have marketed an additional 250 cars of lemons at an additional return to their growers of $270,000 had it not been for the restrictions on shipments imposed under the lemon order (R. 174–5). These figures are based upon an assumed market in which all of appellants' competitors are subject to proration but appellants themselves free to market as they please. Of course, such a market would permit the appellants to dispose of substantially all their lemons at a large profit even in 1941, a year of tremendous overproduction, but that certainly is no defense to the complaint. It is interesting to note that appellants are not attacking the whole proration plan so that if they should be successful all handlers would be free of it; they simply ask a special dispensation for themselves. What appellants' return to their growers would have been in the year 1941 had there been no proration at all is a matter of speculation, but, considering the great overproduction in that year, it is not out of place to suggest that it would have been very small indeed.

The proffers of evidence more than once contained the statement that when, by reason of having filled

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[5] Allotments under the lemon order are made only with respect to interstate fresh fruit shipments. All handlers are completely free to sell in the intrastate fresh fruit market and in the by-products market. Marketable lemons which cannot be sold as fresh fruit are usually diverted to by-products (R. 231).

their allotments, appellants could no longer completely supply their customers, the customers would turn to the California Fruit Growers Exchange for their additional needs (R. 175, 185–6, 210), thereby implying that the Exchange was not similarly restricted. No evidence was proffered in support of such implication, however, and its falsity is so obvious that it need not be elaborated upon.

The proffers of evidence show appellants' percentage of the total industry-wide fresh fruit lemon shipments in the crop year 1940–41 both before and during the period of proration under the lemon order (R. 289). It is true that after the beginning of proration, appellants' percentage of total lemon shipments showed a drop, but that does not tell the whole story. The same evidence reveals that for several months prior to the beginning of compulsory proration appellants' percentage of total shipments was abnormally high. It may be inferred that appellants were making heavy shipments in anticipation of the restrictions of the order. Such heavy shipments, however, would deplete the quantity of lemons appellants had in store available for shipment, and, since allotments under the order are based on the quantities of lemons each handler has in store,[6] the appellants' allotments immediately after the beginning of proration would be comparatively small. This is borne out by the fact that appellants' percentage of total

[6] Sec. 953.4 (d) (3), (5) of the order also provides for alternative methods of computing a handler's lemons available for shipment. It is under this section that the "tree count" method was established.

lemon shipments shows a steady rise after proration began if the figure for June is discounted, as indeed it must be, because of heavy overshipments in that month (R. 265, 289).

E. Appellants' claim of discrimination with respect to small size tree-ripe lemons

In their supplemental brief, the appellants deal at length with the discrimination alleged to result from the fact that the lemon order treats small size tree-ripe lemons in the same manner as it treats large size green ones (Appellants' Supplemental Brief 19–22). It must be kept in mind that no person handles lemons of any one color or size exclusively. All orchards produce lemons of every size and color in varying proportions in different years, although many orchards consistently turn out a higher than average proportion of lemons of a certain color and size (R. 118–122). Of all the appellants, only Chula Vista handles a comparatively large percentage of small size tree-ripe lemons (R. 183–4).

The appellants in their supplemental brief at pages 13–14 refer to the stipulated evidence (R. 121) that orchards in the interior areas produce a higher proportion of tree-ripe lemons than orchards in the coastal areas of California It is significant that appellants are engaged in the handling of lemons grown in Los Angeles, Orange, San Diego, and Ventura Counties (R. 64–65, 86, 88, 89, 91), all of which are coastal counties and considered as largely coastal areas in lemon production. The total number of handlers, including appellants, handling lemons in each of these

counties is approximately as follows: Los Angeles County, 48; Orange County, 33; San Diego County, 11; and Ventura County, 18.[7]

Allotments under the order are based upon the ratio of the quantity of lemons each handler has available for shipment to the total quantity of lemons available for shipment by all handlers. The greater the number of lemons a handler has in store in comparison to other handlers, the greater will be his proportionate share of the total weekly quantity to be shipped. The allotments are fixed each week for each handler, but the prorate base (the proportion between each handler's lemons in store and the total number of lemons in store) is fixed every two weeks.

Tree-ripe lemons have a storage life of from ten days to six weeks whereas green lemons may keep in storage as long as four to six months (R. 121). The allotments of a handler with a disproportionately large number of tree-ripe lemons may not be large enough to enable him to ship all of them during their comparatively short storage life. This is also true of green lemons, but a longer period of time will elapse before such lemons will deteriorate. Any resulting disadvantage with respect to tree-ripe lemons is merely a reflection of what they would suffer in a free market. Such lemons must be marketed within a short period of time regardless of market conditions. As appellants themselves say, they must be moved even though the market may be

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[7] *Farmers' Business Associations*, Farm Credit Administration, United States Department of Agriculture, April 1943, 5–19.

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already oversupplied and a better price could be obtained for them if held longer (R. 165–166).

The disadvantage of tree-ripe lemons in a free market is readily apparent. The peak picks of tree-ripe lemons which occur early in the season must be moved to market without delay. In a year of a heavy crop, vast quantities of these lemons would be shipped indiscriminately to an over-supplied market with what would necessarily be a devastating effect on prices. Nor would all such lemons be sold. Many would rot in the terminal markets for want of a customer. The green and silver lemons, however, would be held back to await better prices and a stronger market.

The largest single factor affecting demand for lemons is temperature (R. 169).[8] Tree-ripe lemons must be shipped within a short time after picking whether temperature conditions are good or bad, whereas other lemons can await a more propitious market. When tree-ripe lemons are dumped on the market, the price for all lemons goes down. Appellants make the claim that tree-ripe and green lemons do not compete with one another, but to the consumer all lemons are the same. When the market is glutted, the price of all lemons is depressed. There is not one market for tree-ripes and another for greens.

It thus appears that the marketing disadvantage of tree-ripe lemons is not arbitrarily created by the

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[8] Price must be carefully distinguished from demand. The price for lemons is determined by the interplay of the forces of *supply* and demand.

lemon order, but is an inherent disadvantage existing independently of the order. This can hardly be said to be discrimination.

At pages 19–20 of the appellants' supplemental brief is given what purports to be an example of how the order operates. The hypothetical situation selected is wholly unrealistic and is designed to show a discrimination that would never exist in fact. For instance, each handler posited has exclusively green and tree-ripe lemons, respectively. But Chula Vista, the only appellant with a disproportionate share of tree-ripe lemons, is shown to handle only about fifty percent of tree-ripes (R. 184). The storage life of the tree-ripe lemons is given at thirty days, whereas that of the greens is given at the maximum of six months.[9] The handler who has ten carloads of green lemons in store is presumed to hold them for the full six months, at which time, although more likely before, it will be necessary to divert them to byproducts. He is also presumed to have other lemons (including tree-ripes) to ship against them. If he had not, a situation which could hardly exist in fact, he would be able to ship no more than 9.7 carloads over the six-month period. The handler with ten carloads of tree-ripe lemons is presumed to have no green lemons against which he could ship the tree-ripes, which is likewise a situation remote from actuality. Instead of either of these improbable handlers, take Chula

[9] The evidence shows that green lemons hold in store from four to six months, but that it is advisable to ship them within three or four months if they are to reach the consumer in good condition (R. 228).

Vista with its fifty percent of tree-ripes. Assume that it has ten cars in store, that its tree-ripes will last thirty days, and that one carload may be shipped each week for each ten in store.[10] Since every wise handler disposes of his weaker fruit first, in the first thirty days Chula Vista would be able to dispose of approximately three and three-fourths of its five carloads of tree-ripe lemons. Only one and one-fourth carloads would be left to be marketed intrastate or sent to byproducts. Of the remaining five cars of green lemons, assuming a storage life of six months, 4.5 cars could be shipped. Thus, Chula Vista could ship a total of 8.25 cars as compared with 9.6 if all of its lemons were green. The difference is no greater than the natural economic disadvantage of tree-ripes in a free market.[11]

Another claim of discrimination is made which is applicable only to Chula Vista. Evidence was proffered to show that the tree-ripe lemons handled by this association are of smaller than average size and that such lemons have their best market in the South especially in the months of April, May, and June, whereas the larger size lemons (usually green) have their best market in July, August, and September (R. 187, 191). The discrimination is said to exist in that the small size tree-ripe fruit with its short storage life and limited good marketing period is treated in the same manner as large green lemons which have

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[10] These are the same conditions used by appellants in their example.

[11] There would be less disparity if a shorter storage life is assumed for green lemons. See footnote 9, page 15.

a longer storage life and generally better marketing opportunity throughout the year. As a result Chula Vista claims it is unable to secure sufficiently large allotments to enable it to dispose of all its small fruit before the peak demand therefor passes (R. 187).

While the evidence shows that the South likes small lemons, the larger size lemons find a market there also (R. 161). In addition, all handlers have some small lemons to dispose of. Both tree-ripe and green lemons grow and must be marketed throughout the year (R. 120). Thus, all handlers compete for the Southern market in the sale of both their small and large lemons. The North prefers large size lemons but small lemons compete with them there (R. 121, 187). Comparative prices determine the extent of the competition in both the North and the South.[12] Proration and allotments are made effective when supply and demand conditions are such that the available market will not absorb all the available lemons at favorable prices. This is true whether the available market is in the South or elsewhere. It would neither be feasible to distinguish among lemons on the basis

[12] Demand in the South reaches a peak earlier in the season than demand in the North (R. 162). This is because it gets warmer there first. However, the peak picks of tree-ripe lemons also occur early in the season (R. 121). Thus, the proportion of the total available crop which is small size tree-ripe lemons is greatest when the South's demand is greatest. Since the heavy picks of green lemons occur later in the season, comparatively small numbers of such lemons are available for shipment to the South. This would seem to work out very equitably for handlers of a large percentage of small size tree-ripe lemons. Similarly the proportion of green lemons in the total available crop is greater when demand in the North reaches its peak.

of color or size,[13] nor fair to exclude particular colors or sizes from particular markets.

If a situation occurs where a handler has a large proportion of small tree-ripe lemons and his allotments are too small to enable him to dispose of a substantial quantity of such lemons during the peak period of demand for them, the borrowing provisions of the lemon order (Order, Section 953.4 (h)), designed for just such contingencies, may be resorted to by the handler. If all other handlers are overstocked with small lemons, he will probably be unable to borrow, but if, as is more likely, all are not overstocked there is no reason to suppose that he will be unable to obtain loans. These may be repaid when the peak season for small lemons has passed. Moreover, the provision in the order for ten percent overshipments (Order, Sec. 953.4 (f)) will also offer some relief.

As the order operates, it is in a year of a large crop that all handlers must divert from interstate fresh-fruit channels some of their fruit. This applies as well to handlers of a large proportion of small tree-ripe lemons such as Chula Vista. The comparative figures with respect to storage and diversion by Chula Vista, proffered at page 189 of the record and reprinted at pages 20–21 of appellants' supplemental

[13] If separate treatment is to be accorded to small size tree-ripe lemons, there would be no basis for failing to accord similar special attention to silver and light green lemons. In view of the fact that all groves produce varying proportions of lemons of each color in different years (R. 122), the difficulties of administering such an order would be insurmountable.

brief, leave out of account the fact that the 1940–41 crop was vastly larger than any previous one (see also R. 182, 200, 212, 231). As a result, the comparisons with other years are very misleading. Likewise, it should be recalled that in previous years Chula Vista had the advantage of a market supported by the voluntary proration of the California Fruit Growers Exchange.

The small size tree-ripe lemon has the same natural economic disadvantage as all tree-ripes, but in a somewhat more aggravated form. All lemons shrink while in store (R. 190), and the smallest lemons may shrink to the point where they are no longer marketable in fresh fruit channels. Shrinkage often depreciates the value of all lemons, for while it may slightly increase the price per box, there are more lemons to the box (R. 190–191). So far as the proffered evidence shows that the South will pay a premium price for the smaller size lemons (R. 163, 191), Chula Vista is less damaged by such shrinkage than the proffer of testimony would seem to indicate. Good merchandising practices may eliminate much of the potential loss in small size tree-ripe lemons. If allotments are filled first with the weaker lemons, leaving the stronger lemons to await future allotments, the quantity of fruit which would become unmarketable may be materially decreased.

Chula Vista has proffered no evidence to show that the actual, as opposed to the theoretical, operation of the order has caused it injury of which it has a right to complain. The real grievance of Chula Vista

is that the lemon order has prevented it from marketing all of the lemons that it otherwise could have marketed. But this is true of all handlers affected, and appellants recognize that this is a natural consequence of compulsory proration (R. 207).

Chula Vista has compared its interstate shipments in former years with its record in the first five months of proration (R. 182–184, 189–190).[14] But in previous years, as has been shown, approximately ninety percent of the supply of lemons was voluntarily prorationed, and the crop during the five-month period in question was the largest in lemon history. The comparison, of course, shows that Chula Vista did market as fresh fruit a higher proportion of its crop in the preceding years than it did during the period of compulsory proration, but the comparison is unfair and does not show discrimination.

The statistical evidence offered to show that Chula Vista has not fared as well under compulsory proration as other handlers affected is also without force. Appellants' Exhibits C (R. 264) and D (R. 265) indicate that had it not been for overshipments, Chula Vista would have shipped as fresh fruit a slightly smaller percentage of its crop than the average for the industry. The record shows, however, that the various associations belonging to Mutual Orange Distributors had made very heavy shipments of lemons immediately

[14] No effort was made to show the actual number of boxes of lemons marketed in fresh fruit channels in former years as compared with 1940–41, the first year of compulsory proration. Since 1941 was a year of an extraordinarily heavy crop, any other method of comparison with other years would be most deceptive.

prior to the beginning of compulsory proration, thus reducing their bases for the first several allotments (R. 289).[15] Likewise the statistics are deceptive in that they do not show how much greater Chula Vista's allotments would have been had it not been for its heavy shipments in excess of allotments.[16] This evidence does not show that Chula Vista has been forced to bear more than its fair share of the lemon surplus under compulsory proration, and no effort was made to show that Chula Vista has fared worse than others similarly situated.[17] This can hardly be said to establish discrimination.

F. Appellants' claim of loss of business to the California Fruit Growers Exchange

Throughout the record, it is stated time and again that the effect of the lemon order will be to force the appellants out of business and create a monopoly in the California Fruit Growers Exchange (R. 175, 186, 210, 224, 237). This anticipated catastrophy has not yet come to pass. Nor has any evidence been proffered to show that it will other than the predictions of the officers of Mutual Orange Distributors and its member associations. Their reasoning as set forth in the record is that Mutual Orange Distributors and the California Fruit Growers Exchange are the two biggest

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[15] See p. 11 of this brief.

[16] Overshipments would reduce the number of lemons in store and thereby reduce the prorate base.

[17] There are ten other associations with orchards in the same area as Chula Vista. None of them is a party to this case and none of them belongs to Mutual Orange Distributors. See footnote 7, page 13 of this brief.

lemon marketing associations in the country, that the Exchange has more members and controls more lemons than does Mutual Orange Distributors, and, therefore, when the allotments of Mutual Orange Distributors are not sufficient to enable it to supply all its customers' needs they will be lost to the Exchange. The complete answer is that the members of the California Fruit Growers Exchange are likewise subject to compulsory proration under the order and cannot ship more than their allotments. It is impossible under compulsory proration for any one marketing association to acquire a monopoly because, as long as other associations have lemons available for shipment, no one association would receive allotments large enough to satisfy the demand. What really hurts the appellants is that under proration they are compelled to bear a fair share of the burden of any annual surplus of lemons, a load which has hitherto been carried by the members of the Exchange alone.

G. The effectiveness of proration

Proration has been effective. The report of the Lemon Administrative Committee (R. 256) shows that in 1941, the biggest crop year in history, price fluctuations were more gradual than they were the year before, although in 1941 many more carloads were shipped interstate. The fluctuations in 1941 were only slightly less gradual than the average for the years 1938–1940, all years of comparatively small crops.[18]

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[18] The 1938 production was 9,304,000 boxes; 1939, 11,106,000 boxes; 1940, 11,983,000 boxes; 1941, 17,099,000 boxes. Agricultural Statistics (1942), United States Department of Agriculture, 236.

Averages, however, even out severe fluctuations in individual years. Perhaps the most striking testimonial to the effectiveness of compulsory proration is that prior to 1941, in almost every year when there was a crop substantially larger than that of the preceding year, the total farm value of the greater crop was less than that of the smaller. This situation was sharply reversed in 1941, although the 1941 crop exceeded that of 1940 by the greatest margin on record.[19]

H. Appellants' claim of restriction generally on their methods of doing business

Appellants' Supplemental Brief (pp. 9, 22) attacks the lemon order on the ground that the evidence shows that appellants are especially injured when allotments are too small to enable them to pack at least two or three carloads at a time (R. 197, 229). They are, however, at no greater disadvantage than other handlers. For instance, the record shows that on the average each member association of the California Fruit Growers Exchange handles lemons for about 66 groves, against a figure of 77 groves for the average member of Mutual Orange Distributors (R. 8, 129). There is no basis for assuming that the allotments for the individual associations of the Exchange are any larger than those for the Mutual Orange Distributor associations, or that the former do not labor under the same conditions with respect to shipping carload lots as the latter.

The California Fruit Growers Exchange has member associations in every area in which appellants are

[19] Agricultural Statistics (1942), United States Department of Agriculture, 236.

located. Its groves match appellants' kind for kind and place for place. Whatever appellants suffer or benefit under the lemon order, the individual members of the Exchange suffer or benefit in equal degree.[20] The numerous inferences in appellants' supplemental brief that the California Fruit Growers Exchange is more favorably treated under the lemon order than the appellants are wholly unwarranted.

The appellants have proffered evidence that prior to compulsory proration 90 to 95 percent of their interstate shipments were made pursuant to private sale, and that the effect of the order is to compel them to sell a larger percentage of their lemons through the auction markets (R. 157, 176). The opinion is expressed that this effect of the order will result in lower net returns to appellants (R. 176). However, the evidence demonstrates that the opinion is unfounded, for the prices received at appellants' private sales were for the most part determined by currently prevailing auction market prices (R. 158). Just how the lemon order operates to prevent appellants from continuing their private sales practices is not clear. It seems hardly credible that appellants, who before compulsory proration could market most of their lemons at private sale, can not continue to do so afterward. Even if the effect of the lemon order is to compel appellants to go into the auction markets where they meet the competition of the California Fruit Growers Exchange (R. 225), that does not show any discrimination. The appellants may not

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[20] See footnote 7, page 13 of this brief.

complain that the order does not protect them from the hazards of lawful competition. *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939); *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170-171 (1934). The California Fruit Growers Exchange competes with appellants in the private sale market.[21] Insofar as appellants are unable to dispose of their fruit at private sale and must resort to auctions, they are in no different position from other handlers. Moreover, as stated above, appellants concede that frustration of their contracts by the lemon order would not make the order vulnerable under the Fifth Amendment of the Constitution (Appellants' Supplemental Brief, p. 3).

III. The applicable legal principles relating to appellants' claim of discrimination

There can be no unconstitutional discrimination when all who are similarly situated are treated alike. *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 121 (1941); *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 424 (1937); *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527, 542 (1931). The evidence proffered by the appellants does not show that they are treated differently from other handlers under the lemon order.

The Fifth Amendment has no equal protection clause. The Supreme Court has clearly implied that before Federal legislation will be held to violate the

[21] The Citrus Industry and the California Fruit Growers Exchange System, Circular C-121, June 1940, Farm Credit Administration, United States Department of Agriculture, 62.

due process clause of the Fifth Amendment on the ground that it is discriminatory, the discrimination would have to be more marked than would be necessary to invalidate similar state legislation under the equal protection clause of the Fourteenth Amendment. *Detroit Bank* v. *United States,* 317 U. S. 329, 337–8 (1943); *Currin* v. *Wallace,* 306 U. S. 1, 14 (1939); *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584 (1937).

Even in passing upon the question whether a state regulation is so discriminatory as to violate the Fourteenth Amendment, the function of the court is simply to determine whether it is possible to say that the legislative classification is *without any rational basis. Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 594 (1939); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 (1938); *Dominion Hotel* v. *Arizona,* 249 U. S. 265, 269 (1919). In *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584 (1937), the Supreme Court said that, even under the restrictions of the Fourteenth Amendment, a classification that has support in considerations of policy and practical convenience cannot be condemned as arbitrary. And it was stated in *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 511–13 (1937), that administrative convenience and the feasibility of enforcement may alone be a sufficient basis for classification. All this means that unless appellants have succeeded in showing, and the burden is upon them, that the classification adopted by the lemon order is wholly without reason or support in considerations of policy or administrative necessity, they have failed to make out a defense. It is submitted that

appellants have fallen far short of success by this test.

In considering the evidence proffered by appellants, it must be remembered that a particular method of classification cannot be condemned because another method more nicely adjusted to account for individual differences might have been chosen. The legislature is not required to make meticulous adjustments in order to avoid incidental hardships. *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 424 (1937). Nor is the validity of an Act of Congress to be refused application by the courts as arbitrary, capricious and forbidden by the due process clause merely because it is deemed in a particular case to work an inequitable result. *Wickard* v. *Filburn,* 317 U. S. 111, 129–130 (1942).

To deny the legislature the power to classify according to general considerations would be to deny the power of classification altogether. For it is always possible by analysis to discover inequalities as to some persons embraced within a specified class. *Miller* v. *Wilson,* 236 U. S. 373, 382 (1915). See also *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911). So when a regulation embodies a plan generally fair and equitable, particular cases of inequality or hardship that may arise in the course of its ordinary application must be borne. *Dominion Hotel* v. *Arizona,* 249 U. S. 265, 269 (1919).

Thus, even if appellants had been successful in their attempt to show that the classification adopted by the lemon order may work an inequity under certain

circumstances, no valid defense to the complaint would have been made out. The lemon order applies the equitable principle that all handlers shall share in the burden of any surplus lemon crop. It has sought to distribute that burden evenly. The Constitution does not require that this be done with mathematical precision, or that every possible individual hardship be eliminated.

IV. The district court followed the direction of the act in excluding the evidence proffered by the appellants to show discrimination in the lemon order

The appellee's argument on this point, as contained in its original brief, is supplemented herein in the light of cases since reported and of the oral argument which took place on October 15, 1943.

A. The evolution of the statutory direction

The lemon order is an excellent example of the quota type of governmental regulation which has come into prominence during the last decade. A total advisable quantity of lemons for weekly shipment is determined for allotment among handlers whenever the relation of supply to demand is such as to call for proration. The order is characterized by a symmetry which makes it extremely sensitive to the slightest disturbance in operation. Even an isolated overshipment of an allotment may not be viewed with indifference. The unfair advantage thus gained by the violating handler is such as to constitute a strong inducement to his competitors to commit similar violations. Clearly the lemon order is unworkable unless all who are subject to it comply.

It is eminently reasonable, therefore, that the Act requires a handler to comply with his allotment pending the resolution of any complaint he may have with respect to the impact of the order upon him. The Secretary of Agriculture is charged by the Act with the issuance and administration of the order. The order was issued by him, as required by the Act, only after a public hearing at which all interested persons were permitted to be heard (Act, Sec. 8c (3), (4)). As the issuing authority, the Secretary is also required to hear the complaint of any handler, and a ruling thereon adverse to the handler is subject to judicial review (Act, Sec. 8c (15)). The specific provisions of the Act that the pendency of such a complaint shall not hinder the enforcement of the regulation against the handler, and that any enforcement proceeding shall abate upon the rendition of a final decree in the review proceeding, indicate clearly the purpose of the Congress to require compliance on the part of any handler pending the determination of his complaint (Act, Sec. 8c (15) (B)). In this way, the dual purpose of affording a remedy to the complaining handler and of keeping the operation of the order intact in the meantime is served.

Proration of oranges, similar in every substantial respect to the proration of lemons, was in effect under the licensing system of the Agricultural Adjustment Act of 1933 (48 Stat. 31, 7 U. S. C. 601 *et seq.*). The amendments of August 24, 1935, 49 Stat. 750, in substituting orders for licenses and providing in detail for the proration plan, adopted the administrative experience gained under the act prior to its amendment.

These amendments were carried forward in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted with further amendments the important marketing provisions of the Act of 1933. The Act of 1933 was one of the first of the extensive regulatory measures enacted to combat the grave economic depression which had stagnated the business of the Nation. The situation was almost comparable in its gravity to the war-time conditions preceding the enactment of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. 901 *et seq.*), which requires merchants and landlords subject to price and rent regulation, respectively, to comply therewith pending an administrative determination of their complaints, subject to judicial review. This rule of compliance is expressly provided for in that act. It is embedded by necessary implication in the act now under consideration. The rule is complementary to the general principle that, where administrative relief has been provided for, any complaint with respect to a regulation must be submitted to the administrative process before resort to the courts.

B. Cases arising under the Emergency Price Control Act

The rule of compliance first and litigation afterward has been invoked in many cases arising under the Emergency Price Control Act. The Supreme Court of the United States, in *Lockerty* v. *Phillips,* 319 U. S. 183 (1943), held that the provisions of the act conferring exclusive jurisdiction upon the Emergency Court of Appeals to determine the validity of a price or rent regulation in a review of an administra-

tive ruling denying a protest against the regulation, had the effect of depriving the district courts of the United States of jurisdiction to determine such validity in an action to restrain criminal prosecution of a merchant for violating a price order. The Court left open the question of the scope of defense in an enforcement or criminal proceeding brought under the act. The question thus left open is probably now before the Supreme Court in *Rottenberg* v. *United States,* in which certiorari was granted on November 8, 1943, 12 L. W. 3161, to review a decision of the United States Court of Appeals for the First Circuit, 137 F. 2d 850, and in *Brown* v. *Willingham,* in which the Court noted probable jurisdiction on November 15, 1943, 12 L. W. 3169, to review a decision of the District Court of the United States for the Middle District of Georgia, 51 F. Supp. 597. In the *Rottenberg* case, the Court of Appeals held that the defense that the price regulation was arbitrary was not open to the defendant in a criminal prosecution. In the *Willingham* case, the contrary ruling was made that a defense based upon the invalidity of a rent regulation could be interposed by the landlord in an enforcement action against him by the Price Administrator.

The rule of the *Rottenberg* case has been applied in many other cases for the enforcement of price and rent regulations issued under the Emergency Price Control Act: *Henderson* v. *Burd,* 133 F. 2d 515 (C. C. A. 2d, February 9, 1943); *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. C. Kansas, October 23, 1942-Three-

judge court, with Judge Phillips, Circuit Judge, presiding), each involving an action to enjoin violations of a regulation; *United States* v. *C. Thomas Stores, Inc.,* 49 F. Supp. 111 (D. C. Minn., February 26, 1943); *United States* v. *Sosnowitz & Lotstein,* 50 F. Supp. 586 (D. C. Conn., March 25, 1943); *United States* v. *Friedman,* 50 F. Supp. 584 (D. C. Conn., March 25, 1943); *United States* v. *Slobodkin,* 48 F. Supp. 913 (D. C. Mass., March 2, 1943); *United States* v. *Central Packing Corp.* 51 F. Supp. 813, 12 L. W. 2198 (E. D. New York, September 13, 1943), each involving criminal prosecution for the violation of a regulation under the act, and *Brown* v. *Lee,* 51 F. Supp. 85 (S. D. Calif., August 12, 1943-Three-judge court, with Judge Stephens, Circuit Judge, presiding), in which the defendant in a suit to enjoin violations of a rent regulation was held not entitled to counterclaim for affirmative relief against the regulation and in which *Henderson* v. *Kimmel, supra,* was cited with approval. Contrary decisions are *Brown* v. *Wyatt Food Stores, Inc.,* 49 F. Supp. 538 (N. D. Tex., March 8, 1943); *Brown* v. *O'Connor,* 49 F. Supp. 973 (N. D. Tex., May 14, 1943), and *Payne* v. *Griffin,* 51 F. Supp. 588 (M. D. Ga., August 30, 1943), the last-mentioned case being a companion case below with *Brown* v. *Willingham, supra.*

In *Brown* v. *Hecht Company,* 137 F. 2d 689, 695 (D. C. App., July 22, 1943, certiorari granted October 18, 1943, 12 L. W. 3127), it was held that the district courts are *required* by the express terms of the price control law to enjoin violations of price regulations

notwithstanding the lack of wilfulness in past violations and the mere probability of innocent future ones. The court said, "The limitation upon the court's discretion is unusual, but the situation which evoked it is extraordinary." Judge Eicher, in concurring, said "If specific regulations cannot be complied with, the place to test them is not in this proceeding but in the forum that Congress has provided * * *."

C. Rationalization of the statutory direction

The principle contended for above is rationalized by the observation that the administrative process on complaints with respect to a regulation should be permitted to go on to its natural conclusion before resort to the courts, with consequent avoidance of the necessity of having the administrator establish the validity of the regulation in every action for civil enforcement or criminal prosecution under the act, and that any incidental hardship or inconvenience to the complainant should be borne in the interest of the greater public good resulting from compliance with the regulation until it is set aside or amended in an orderly way. See *Rottenberg* v. *United States, supra,* 856–857.

D. Cases relied upon by appellants are inapplicable

In contending that the lower court should have received and considered the proffered evidence relating to the discriminatory operation of the lemon order against them, the appellants rely largely upon *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38

(1936), and *Denver Union Stock Yard Co.* v. *United States,* 57 F. 2d 735 (1932 Three-judge court). Each of these cases involved a statutory proceeding to set aside an order of the Secretary of Agriculture, issued pursuant to the Packers & Stockyards Act (7 U. S. C. 181 *et seq.*), and the hearing was upon the record made before the Secretary. In each case the administrative order was challenged as confiscatory. The order was upheld in the *St. Joseph* case and set aside in the *Denver* case.

An order made by the Secretary of Agriculture under the same act, following the decision in the *Denver* case, was later upheld against the charge of confiscation in *Denver Union Stock Yard Co.* v. *United States,* 21 F. Supp. 83 (1937-Three-judge court), affirmed 304 U. S. 470 (1938). The case was heard upon the record before the Secretary and the findings of the Secretary were accorded controlling weight. The District Court said that the claim of confiscation was supported by legal conclusions only and not by facts, and the Supreme Court stated that "plainly the evidence is insufficient to require or warrant a finding" of confiscation. See also *Acker* v. *United States,* 298 U. S. 426 (1936).

In each of the cases above, the Court was reviewing an administrative ruling upon the basis of the administrative record. The advantage of the administrative proceedings in assembling the constitutional or jurisdictional facts was clearly recognized. The Court, while apparently exercising its own independent judgment on these facts, accorded considerable,

and sometimes controlling, weight to the findings made by the administrative body. In each case, the Court regarded the administrative process as an integral part of the judicial process. It was in connection with a judicial review of the ruling of an administrative body that the Supreme Court approved, in *Crowell* v. *Benson,* 285 U. S. 22 (1932), a trial *de novo* as to the jurisdictional and constitutional facts determined by the administrative body.[22]

The appellants have presented their complaints to the Secretary of Agriculture. The Secretary has made a ruling thereon. A judicial review of this ruling is now pending in the same district in which the instant case arose. The District Court has remanded the case to the Secretary for additional evidence and findings upon all the issues involved. The issues involved comprise not only the complaint of discrimination presented in the instant case, but other objections to the validity of the lemon order. The Act provides that the proceeding in the instant case shall abate upon the rendition of a final decree in the judicial review proceeding, and the judgment in the instant case, which consists of an injunction against violations of

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[22] Mr. Justice Brandeis filed a vigorous dissent in which the present Chief Justice and Mr. Justice Roberts joined. An interesting discussion of the present vitality and scope of the rule is contained in *Pike and Fischer*, *Administrative Law*, Vol. 2, pp. 146–172. See also *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337, 345 (1937); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 (1938); *Newport News Shipbuilding & D. D. Co.* v. *Schlauffler*, 303 U. S. 54, 57 (1939), and *Lockerty* v. *Phillips*, 319 U. S. 183 (1943), cited in appellee's original brief at pages 14–15.

the lemon order by the appellants, expressly provides that it shall continue in effect only until further order of the District Court or until such time as a judgment determining that the lemon order is invalid or inapplicable to the appellants is entered in the District Court in the review proceedings.

The cases discussed above, and relied upon by the appellants, strengthen rather than weaken the view that the appellants should not be permitted in this case to by-pass the administrative determination of their complaints. The constitutional-fact doctrine serves only to illustrate the fullness of judicial review of administrative rulings of a quasi-judicial nature. There is nothing in the doctrine which militates against the constitutionality of a statutory direction that the validity of a regulation may not be determined in a civil or criminal prosecution for its violation.

CONCLUSION

It is respectfully submitted that the District Court acted properly in refusing to consider the evidence proffered by the appellants relating to the discriminatory operation of the lemon order against them, and that, in any event, such evidence is insufficient

in law to support the defense of discrimination. The judgment of the District Court should, therefore, be affirmed.

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